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No. 98-1054

In the Supreme Court of the United States

OCTOBER TERM, 1998

VISALAKSHI MALLADI, PETITIONER

v.

TOGO D. WEST, JR., SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly granted summary judgment for respondent in petitioner's lawsuit charging respondent with unlawful employment-related discrimination and retaliation for protected activity.

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 2a-59a) is reported at 987 F. Supp. 893.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1998. A petition for rehearing was denied on October 2, 1998 (Pet. App. 61a). The petition for a writ of certiorari was filed on December 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a physician who has worked for the Department of Veterans Affairs (VA) since 1985. Pet. 3. In 1988, petitioner began serving as a staff physiatrist—a physician who specializes in the treatment of illness by physical means—in the Physical Medicine and Rehabilitation Service (PM&RS) of the VA Medical Center in Tuskegee, Alabama. Pet. App. 6a. The VA designated petitioner Acting Chief of the PM&RS in September 1988, and subsequently appointed her Chief of the PM&RS in March 1989. *Ibid.*

2. Between 1992 and January 1995, petitioner filed seven Equal Employment Opportunity (EEO) administrative complaints against the VA. Pet. App. 6a. In these complaints, petitioner alleged that the VA had discriminated against her on the basis of her race, sex, national origin, and handicap, and had retaliated against her for engaging in protected activity. *Ibid.*

In 1995, petitioner signed a "global settlement agreement" in which she agreed to withdraw the seven EEO complaints and waived her right to file a civil action in connection with the discriminatory and retaliatory acts they alleged. Pet. 8; Pet. App. 6a. For its part, the VA agreed (among other things) to "provide [petitioner] with an opportunity for management training." *Id.* at 13a n.6. The VA also agreed that, should it "fail to comply with any of the terms" of the agreement, it would reopen petitioner's complaint for further processing. Pet. 7; Pet. App. 13a. During the six months following the settlement, the VA notified petitioner (along with other employees) of two opportunities for management training. See *id.* at 16a. Petitioner did not respond to these notifications. See *ibid.*

3. In the remainder of 1995 and 1996, petitioner filed six more EEO complaints and four administrative grievances against the VA. Pet. App. 6a-11a. Several of these EEO complaints focused on her superiors' unwillingness to grant petitioner's requests to fill staff positions in the PM&RS. See *id.* at 6a, 7a. Petitioner's discrimination and retaliation charges included allegations that employees of the VA had called her at home once when she was on sick leave, shouted at her during a meeting, made negative statements about her to an EEO counselor investigating her earlier EEO complaints, and taken too long to respond to her request for an EEO counselor's report. See *id.* at 6a-11a.

During this period, the Director of the Tuskegee Medical Center asked the VA Central Office to conduct an external review of the PM&RS, to address morale problems among the staff. Pet. 4; Pet. App. 7a. The VA granted the request and assigned a committee of doctors culled from other VA offices to conduct the external review. Pet. 4. Before visiting the Medical Center, the committee asked the Director of the Medical Center to send them all of the formal complaints and grievances filed by staff or patients of the Medical Center over the prior several years. Pet. 4-5.

The committee conducted the external review in late 1995, and issued a report summarizing its findings. Pet. App. 7a-9a. In the report, the committee noted that it found serious problems in the PM&RS, including very low employee morale, infighting among employees, minimal evidence of quality improvement initiatives, and irreconcilable differences between petitioner and her staff. *Id.* at 7a-8a. The committee also observed that petitioner's "continued filing" of EEO complaints had caused her superiors to "feel incapacitated in providing [her] with adequate direction and assistance in

management of her service." *Id.* at 8a; see *id.* at 47a. After the report issued, the VA reassigned petitioner to another position within the Medical Center. *Id.* at 9a. Petitioner's twelfth and thirteenth EEO complaints included allegations that the VA's actions in connection with the external review and her subsequent reassignment constituted discrimination against her on the basis of her race, sex, national origin, and handicap, as well as retaliation for her earlier filing of EEO complaints. *Id.* at 9a-11a.

4. In March 1996, petitioner filed this action in the United States District Court for the Middle District of Florida. Pet. App. 10a. The VA moved for summary judgment on all counts, and on December 1, 1997, the district court granted the motion. *Id.* at 59a. In a 72-page memorandum opinion accompanying its judgment, the district court carefully examined each of petitioner's allegations and explained why none could survive the VA's motion for summary judgment.

a. The district court first rejected petitioner's claim pertaining to the seven EEO charges underlying the global settlement agreement. The court acknowledged petitioner's allegation that the VA had breached the portion of the agreement requiring the VA to provide petitioner with management training by failing to make a "special effort" to give her "special notice" of training opportunities. Pet. App. 16a. Observing that settlement agreements are treated as contracts, and conceding that the VA "may well" have breached this term of the agreement,[1] the court nevertheless rejected petitioner's claim on the ground that any breach of this

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[1] The court also stated that it agreed with the Equal Employment Opportunity Commission's finding that this portion of the agreement had been breached. Pet. App. 17a.

term by the VA could not be considered a "material" breach that would entitle petitioner to the relief she sought. *Id.* at 16a-17a.

b. The court also rejected petitioner's attempt to use the external review committee's report and recommendations as evidence that the VA had retaliated against her for having filed EEO complaints. Based on "considerable evidence" submitted by the VA, the court concluded that the reference to petitioner's EEO complaints in the committee's report "was not intended to indicate that management was driven by the EEO charges in any of its decisions, but simply that the charges were a significant theme in its interaction with [petitioner]." Pet. App. 47a. The court noted that the presence of this "significant theme" was hardly surprising, in light of the fact that petitioner "appear[ed] to have filed an EEO charge on every conceivable ground she could imagine, no matter how frivolous." *Ibid.*

5. The court of appeals affirmed the district court's judgment in an unpublished one-sentence per curiam order "based on the thorough and well-reasoned memorandum opinion of the district court." Pet. App. 1a.

ARGUMENT

The decision of the courts below was correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review of this case is unwarranted.

1. a. Petitioner first argues (Pet. 6-8) that the courts below failed to enforce the agreement settling prior EEO complaints, and thereby violated the principle of *Raley* v. *Ohio*, 360 U.S. 423 (1959). This argument has no merit. In *Raley*, this Court held that the criminal conviction of several individuals for their failure to answer questions put to them by a state "Un-American

Activities Commission" violated the Due Process Clause of the Fourteenth Amendment because the Commission's Chairman had assured the individuals, when they were questioned, that they had a right under the State's constitution to refuse to answer questions that might incriminate them. *Id.* at 437-442. *Raley* has no relevance to this case. Petitioner has not been subjected to a criminal prosecution, and has not sought to invoke her rights under the Fourteenth Amendment.

As for petitioner's allegation that the courts below erred in their application of certain terms of the global settlement agreement, this fact-bound claim has no significance beyond petitioner's particular case, and thus clearly does not merit review by this Court.

b. Furthermore, the decisions below on this matter were correct. Petitioner's argument is based on the allegation that the VA breached the term of the agreement providing that the VA shall, "[i]n good faith, provide [petitioner] with an opportunity for management training." Pet. App. 13a n.6. But the VA fulfilled this obligation by providing petitioner with two opportunities for management training, notifying her of courses in which she could seek to enroll. *Id.* at 16a. Petitioner made no effort to take advantage of either of these opportunities. *Ibid.* It is not clear (and petitioner does not explain) what more this provision could have required of the VA. And even assuming that this clause obliged the VA to make "special" (see *ibid.*) efforts to assist petitioner in obtaining management training, there is no basis for the conclusion that the VA would not have made such efforts had petitioner shown any interest in the training opportunities extended to her.

In addition, the district court correctly found that any shortfall in the VA's performance of this term could

not be considered a "material" breach of the agreement that would entitle petitioner to the relief she sought. As the district court pointed out, a settlement agreement is a contract, and issues of its enforcement thus must be resolved by reference to the law of contracts.[2] Pet. App. 13a-14a; see also *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994). The court properly observed that, pursuant to well-established principles of contract law, a party's failure to perform a contract duty may not excuse the other party from her corresponding duties unless the failure to perform is "material." Pet. App. 14a (citing Restatement of Contracts §§ 274, 397 (1932) and Restatement (Second) of Contracts § 241 (1979)); see also Restatement (Second) of Contracts § 237 (1981); *Rose* v. *Davis*, 474 So. 2d 1058, 1061 (Ala. 1985).

Among the factors considered in determining whether a breach is material are the extent to which the other party can be adequately compensated for the failure of performance, the likelihood that the breaching

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[2] The courts of appeals have divided over the issue whether the interpretation of settlement agreements disposing of claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, should be governed by the law of the forum State, or instead by federal common law. Compare, for example, *Snider* v. *Circle K Corp.*, 923 F.2d 1404, 1407 (10th Cir. 1991) (applying federal common law), with *Morgan* v. *South Bend Community Sch. Corp.*, 797 F.2d 471, 474-479 (7th Cir. 1986) (applying state law). The issue is of no consequence in this case, however, because, as we demonstrate *infra*, the result would be the same under either approach. Cf. *Sheng* v. *Starkey Labs., Inc.*, 117 F.3d 1081, 1083 n.1 (8th Cir. 1997) (declining to reach issue of applicable law when determination would not affect the result); *Bowden* v. *United States*, 106 F.3d 433, 439 (D.C. Cir. 1997) (same); *Ferguson* v. *Flying Tiger Line, Inc.*, 688 F.2d 1320, 1322 n.2 (9th Cir. 1982) (same).

party will cure the failure of performance, and the extent to which the breaching party's behavior comports with standards of good faith and fair dealing. See Pet. App. 14a-15a (citing Restatement (Second) of Contracts § 241 (1979)). In this instance, there was no reason to doubt that petitioner could be made whole for the alleged shortfall in the VA's performance, either by an action for damages or by more strenuous efforts on the VA's part to enroll petitioner in management training. Nor was there any basis upon which to question the VA's good faith, in light of the fact that it provided petitioner with two management training opportunities which she declined to pursue.

Contrary to petitioner's assertion (Pet. 7), a contract term providing that one party will be released from its contractual obligations should the other party fail to "comply with any of the terms" of the contract cannot reasonably be read to trigger release whenever a party's performance suffers from any conceivable shortcoming, however inconsequential. Such a clause cannot override the parties' reasonable expectation that only a material shortfall in performance will be treated as a failure to comply with a contract term.

2. Petitioner also argues (Pet. 10) that the courts below erred in applying the burden-shifting framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), because she presented the district court with direct evidence of retaliation by the VA. See, *e.g.*, *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination."); *Merritt* v. *Dillard Paper Co.*, 120 F.3d 1181, 1191 (11th Cir. 1997) (same for allegation of retaliation); *Smart* v. *Ball State Univ.*, 89

F.3d 437, 439 (7th Cir. 1996) (same). This argument is likewise meritless.

What petitioner characterizes as "direct evidence" that her reassignment was motivated by retaliatory animus consists of a few references to her EEO filings that appear in the report of the external review committee that evaluated the Tuskegee Medical Center's PM&RS. Pet. 10-12. These references offer no direct support for the proposition that petitioner's reassignment was motivated by retaliatory animus. They are merely passing mentions included in a much broader report that detailed numerous problems with petitioner's management, including "very low employee morale, substantial infighting among employees, minimal evidence of quality improvement initiatives, poor use of the coordinator position, no communication within the service or with the administration, irreconcilable differences between [petitioner] and the staff, no evidence of workload validation, no process for downsizing, no prioritization of patients to be seen, and no strategic plan." Pet. App. 7a-8a. Evidence indicating that the report as a whole influenced the reassignment action (Pet. 11-12), then, in no way constitutes direct evidence that the few references to petitioner's EEO complaints contained in the report themselves influenced this action. Indeed, as the district court noted, given petitioner's "long and distinguished history of filing EEO charges, * * * [i]t would have been impossible [for the committee] to avoid" mentioning those charges in its review of the workplace environment at the PM&RS. Pet. App. 47a. Connecting these references to the reassignment action thus would require pure speculation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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